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No. 91-670

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In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

RENE MARTIN VERDUGO-URQUIDEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent devotes the bulk of his brief to two related contentions: first, that the extradition treaty with Mexico bars forcible abductions in that country carried out under United States sponsorship, and, second, that a violation of the extradition treaty would mandate repatriation of the seized person to Mexico. Br. in Opp. 14-39. This Court's cases, however, have never sanctioned the extraordinary remedy of repatriation crafted by the court of appeals, and nothing in our extradition treaty with Mexico, which creates and regulates *extradition* obligations, speaks to apprehensions on foreign soil that do not involve extradition requests at all.

The *Ker-Frisbie* doctrine [1] holds that a court does not lose power to try a defendant for crimes on the ground that the defendant's presence was obtained by a forcible abduction. Contrary to respondent's claim, that doctrine is not limited to cases in which there is no "official protest" from a foreign government, or in which the foreign government is not "direct[ly] involve[d]" in the abduction, or in which there is no "direct involvement of the United States in the abduction." Br. in Opp. 17-18. Those distinctions have played no role in this Court's repeated statements that, absent clear directions in a statute or treaty, the forcible apprehension of a defendant does not divest the court of jurisdiction or provide the defendant with immunity from trial. See Pet. 9-12; *Pettibone* v. *Nichols*, 203 U.S. 192, 208 (1906) ("The principle upon which the judgment [in *Ker*] rested was that, when a criminal is brought or is in fact within the jurisdiction and custody of a State, charged with a crime against its laws, the State may, so far as the Constitution and laws of the United States are concerned, proceed against him for that crime, and need not inquire as to the particular methods employed to bring him into the State."); *id.* at 215-216 (rejecting the contention that the *Ker* principle is inapplicable when the defendant's apprehension is accomplished by government action, rather than the acts of private persons); *Cook* v. *Hart*, 146 U.S. 183, 192 (1892) (*Ker* and its progeny establish that "this [C]ourt will not interfere to relieve persons who have been arrested and taken by violence from the territory of one State to that of another, where they are

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[1] See *Ker* v. *Illinois*, 119 U.S. 436 (1886); *Frisbie* v. *Collins*, 342 U.S. 519, 522 (1952).

held under process legally issued from the courts of the latter State"); *Lascelles* v. *Georgia*, 148 U.S. 537, 543 (1893) ("[I]t is settled by the decisions of this [C]ourt that, except in the case of a fugitive surrendered by a foreign government, there is nothing in the Constitution, treaties or laws of the United States which exempts an offender, brought before the courts of a State for an offence against its laws, from trial and punishment, even though brought from another State by unlawful violation, or by abuse of legal process."). The Ninth Circuit's view that it was free to order the district court to relinquish jurisdiction over respondent based on the manner of his apprehension represents a significant departure from the *Ker-Frisbie* rule and is directly at odds with this Court's cases.

Respondent also errs in arguing (Br. in Opp. 26-39) that the court of appeals was justified in reading implied terms into our extradition treaty with Mexico. There is nothing in the extradition treaty that regulates apprehensions accomplished without an extradition request, nor is there anything that requires courts to abandon jurisdiction because the diplomatic representatives of one treaty partner have lodged a protest with their counterparts in the other nation.[2] The extradition treaty is silent on those subjects.[3]

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[2] Because the treaty in this case does not speak to the jurisdiction of courts *except* in cases where extradition has been requested, respondent's reliance (Br. in Opp. 21-24) on *Ford* v. *United States*, 273 U.S. 593 (1927), and *Cook* v. *United States*, 288 U.S. 102 (1933), is misplaced. The treaty involved in those cases put express limits on the adjudicative power of the courts following unauthorized seizures. See Pet. 13 & n.8. The instant treaty does not.

[3] Respondent's detailed survey of the terms of the Extradition Treaty between the United States and Mexico, May 4,

The proposition that international obligations may be imposed on the United States, despite the absence of any language in the treaty delineating those obligations, is inconsistent with basic and longstanding assumptions on which the political branches rely in negotiating and ratifying treaties.

2. Respondent argues (Br. in Opp. 39-41) that the court of appeals' holdings do not warrant this Court's review because the decision below immediately affects only two individuals—petitioner and Humberto Alvarez-Machain. See *United States* v. *Alvarez-Machain*, petition for cert. pending, No. 91-712. The international implications of the decision below, however, raise questions that transcend these two defendants and have a wider public significance. An indication of the exceptional character of this case is found in the fact that the government of Mexico has filed an amicus curiae brief in this Court, defending the holding of the court of appeals but urging the Court to grant review in order to assess the "effect on the administration of justice in the United States of the petitioner's violation of its treaty obligation to Mexico." Amicus Br. of the United Mexican States, at 11.

1978, 31 U.S.T. 5059, T.I.A.S. No. 9656 (Br. in Opp. 29-32), only underscores that the treaty quite specifically regulates extradition, but does not address the use of force by a treaty partner to apprehend a suspect within the borders of another nation or the consequences of such an action. See Pet. 17-18. Respondent asserts that Article 20(1) of the treaty, 31 U.S.T. 5073 (*reprinted at* Pet. App. 81a), "provides that access to each country's national territory may only be gained pursuant to the treaty." Br. in Opp. 29. Article 20(1), however, simply *authorizes* a treaty partner to transport a person surrendered by a third nation through the treaty partner's territory; it does not, as respondent characterizes it, generally *prohibit* all other territorial access.

The decision below is extraordinary. The court of appeals ruled that a district court must renounce all jurisdiction over the defendant in a criminal prosecution, based on the diplomatic protest of a foreign nation declaring that our government's conduct abroad violated an implied obligation in an extradition treaty. The court of appeals' ruling raises fundamental questions about the proper allocation of decisional authority between courts and the political branches of our government in the field of international relations. Moreover, this case implicates important foreign policy concerns. Any decision by the Executive Branch to apprehend a suspect in a foreign nation, without that nation's consent, will necessarily involve the weighing of national and international policy issues. If, as we believe, the court of appeals committed serious errors in defining new constraints under which the United States must operate in the realm of international law enforcement, that error should be corrected by this Court.

3. Respondent notes (Br. in Opp. 42) that the court of appeals remanded this case for a determination of whether the United States participated in respondent's apprehension, and he therefore suggests that this case is not ripe for review. We disagree. The legal rulings challenged by our petition will govern future cases in the Ninth Circuit regardless of the outcome of the specific proceedings on remand. Moreover, although this case is in an interlocutory posture, the issues raised by our petition are also presented in *United States* v. *Alvarez-Machain*, petition for cert. pending, No. 91-712, in which the Ninth Circuit applied the holdings in this case and issued a final order directing the repatriation of the defendant to Mexico. If the Court has any concerns about

the procedural posture of this case, the Court should grant review both in this case and *Alvarez-Machain* and consolidate the two cases for briefing and argument.

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For the foregoing reasons and the additional reasons stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

KENNETH W. STARR
Solicitor General

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